

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20445

RECEIVED
MAR 29 1999
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of Request for)	
Review by Integrated Systems)	
and Internet Solutions, Inc.)	
of Decision of Universal)	
Service Administrator)	
)	
Federal-State Joint Board)	CC Docket No. 96-45
on Universal Service)	
)	
Changes to the Board of)	CC Docket No. 97-21
Directors of the National)	
Exchange Carrier Association)	
Inc.)	
)	
Tennessee State Department)	Application No. 18132
of Education, Application)	
(FCC Form 471) for Approval)	
of Funding)	

To: The Commission

REQUEST FOR REVIEW IN PART OF FUND ADMINSTRATOR'S
EXPLANATION OF FUNDING COMMITMENT DECISIONS

Pursuant to Sections 54.719-54.725 of the Commission's Rules, Integrated Systems and Internet Solutions, Inc. ("ISIS 2000") hereby requests review of the Explanation of Funding Commitment Decisions ("Decision") of the Schools and Libraries Division's Fund Administrator, dated February 25, 1999, with respect to Issue #1, denoted as "Does the ENA Bid Constitute the Most Cost-Effective Bid?" This appeal does

No. of Copies rec'd 074
List A B C D E

not challenge the other determinations of the Fund Administrator, which, as has been previously shown by ISIS 2000, amply support the complete denial of the application for funding filed by the Tennessee Department of Education ("Department"). Rather, this appeal is limited to the Fund Administrator's failure, in the consideration of Issue #1, to find further independent, and important, grounds for the denial of the Department's application.

I. Statement of Interest and Issues Presented

As outlined in greater detail in previously filed pleadings, ISIS 2000 was the unsuccessful bidder for the Department's contract awarded to Educational Networks of America ("ENA") for which USF funding was denied in the decision below. ISIS 2000 participated in and was a party to these proceedings and therefore has standing to bring this appeal as to the Fund Administrator's resolution of the issues raised by ISIS 2000.¹

¹ In addition, currently pending before the Commission is ISIS 2000's Request for Expedited Declaratory Ruling, filed April 3, 1998, and subsequent pleadings requesting a declaratory ruling from the Commission with respect to the issues raised by the Department's competitive bidding process and subsequent application for funding. ISIS 2000 requests that these issues be resolved in conjunction with this appeal.

ISSUE PRESENTED FOR REVIEW

Whether the "creative" competitive bidding procedures employed by the Department in selecting the ENA contract complied with Commission competitive bid requirements set forth in Section 54.504 of the Commission's rules and whether the failure to so comply renders the ENA contract ineligible for funding?

II. The Department's Failure to Comply with Fundamental Competitive Bid Requirements, Standing Alone, Renders the ENA Contract Ineligible for Funding

Section 54.504 of the Commission's rules, in pertinent part, requires that:

(a) *Competitive Bid Requirements*. . . an eligible school, library, or consortium that includes an eligible school or library shall seek competitive bids, pursuant to the requirements established in this subpart, for all services eligible for support under Sections 54.502 and 54.503. These competitive bid requirements apply in addition to state and local competitive bid requirements and are not intended to preempt such state or local requirements.

This requirement is a prerequisite to the eligibility of the ensuing contract for funding. As stated by the Commission in adopting Section 54.504, "to be eligible to receive discounts for telecommunications services, Internet access, and internal connections, eligible schools and libraries had

to comply with our competitive bidding requirement to select the provider of the desired services."²

Under Section 54.511, the key element to the fiscal responsibility of the program is the requirement to consider only pre-discount price in evaluating cost considerations. As summarized in the Joint Board's recommendation of the competitive bid approach, the pre-discount price is "highly significant to schools and libraries because they must pay the undiscounted portion of the price. This gives schools and libraries a strong incentive to secure the lowest pre-discount price. . . ."³ While not absolutely requiring the school or library to select the lowest price bid, but requiring it to base its selection decision on the overall pre-discount price and pay its pro-rata share of the overall pre-discount price, this provides the essential discipline and incentive for the local entity to consider and control overall program costs in a realistic manner.⁴

² Federal-State Joint Board on Universal Service, Order on Reconsideration, FCC 97-246, ¶5, released July 10, 1997.

³ Federal-State Joint Board on Universal Service, Recommended Decision, FCC 96J-3, ¶535, released November 8, 1996. In rejecting other cap or price control mechanisms to ensure program fiscal integrity, the Joint Board emphasized that the requirement to seek competitive bids was essential to the program's fiscal responsibility. Id. at ¶539.

⁴ Under the competitive bid approach adopted by the Commission, while the lowest pre-discount bid price is required to be the primary factor in selecting a bid, the selection of the lowest pre-discount bid is not

The importance of this incentive to the fiscal integrity of the program was stressed by the Commission in exempting certain pre-existing contracts from competitive bidding requirements. While such pre-existing contracts may not have been subject to competitive bidding requirements, the Commission found that a sufficient incentive to negotiate low rates was nonetheless present, even if the contract was negotiated in express anticipation of obtaining discounts from the program. Entities negotiating such contracts during the interim period were nonetheless found to have the necessary incentive to select fiscally reasonable arrangements and not just spend USF funds under an open checkbook theory because they would be required to pay their pro-rata share of the overall pre-discount contract price:

We find . . . that these entities continue to have an incentive to minimize their costs in obtaining service even if they receive section 254(h) discounts. Most important, they will pay a portion of the costs --

absolutely required. Rather, to permit the consideration of other non-cost factors to a reasonable degree, schools and libraries are required to select the most cost-effective bid based on an evaluation of the lowest obtainable pre-discount price as the primary factor and other potentially offsetting non-cost factors as the secondary factor. Federal-State Joint Board on Universal Service, Report and Order, FCC 97-157, ¶41, released May 8, 1997. Specifically, Section 54.511 requires that the school or library "carefully consider all bids submitted and may consider relevant factors other than the pre-discount prices submitted by providers." (Emphasis added.)

between ten percent and eighty percent of any contract price that they negotiate."⁵

In contravention of these requirements, the competitive bid procedures and criteria utilized by the Department sought to, and did, precisely the opposite. As shown by the Department's undisputed Request for Proposals and subsequent evaluation of the ISIS 2000 and ENA proposals,⁶ the cost evaluation criteria used by the Department, on their face, involved no evaluation whatsoever of pre-discount cost considerations. To the contrary, the Department's cost bid criteria and subsequent evaluation focused only on obtaining the highest possible pre-discount price, wholly apart from the evaluation of non-cost factors. It expressly sought to leverage the maximum amount of USF funding that could be obtained for a fixed dollar expenditure by the Department. Specifically, the Department's undisputed bid criteria awarded maximum point credit (30 points) to the bid achieving the greatest amount of USF funding (the "proposal with the Highest Cost Factor", Attachment A, RFP ¶6.2.7),

⁵ Federal-State Joint Board on Universal Service, Order on Reconsideration, supra at ¶10, citing Federal-State Joint Board on Universal Service, Report and Order, supra at ¶549.

⁶ See Attachment A hereto. See also ISIS 2000 Objection to Application and Request for Expedited Declaratory Ruling, pp. 2-12; Reply to Consolidated Response and Renewal Request for Expedited Declaratory

based on a fixed level of Department funding of somewhat over \$5,000,000 per year, which was the Department's current budget for the ConnectTEN system.

Thus, ENA's substantially more expensive pre-discount price (\$74,352,941) received a decisive preference on cost factors over ISIS 2000's lower pre-discount price proposal (\$51,275,384) strictly because it was the more expensive pre-discount price and contemplated more USF funding. Rather than place a fiscal control on the overall pre-discount price, as required by Section 54.504, the admittedly "creative" competitive bid procedure did just the opposite in violation of competitive bid rule requirements. It was an open invitation for a bidder to "game" the USF funding process as much as possible, so long as the Department's expenditure would not be increased.

The Department has defended its approach on two grounds, first, that Section 54.511 accords the educational institution some flexibility to accept a bid based on factors other than lowest pre-discount cost; and, second, that the ISIS 2000 proposal did not provide the same degree of services and was uncertain price-wise. Even assuming

Ruling, filed August 6, 1998, pp. 2-7. All pleadings previously filed by ISIS 2000 with the Commission are incorporated by reference herein.

arguendo some validity to these positions (which ISIS 2000 strongly disputes), these are not the issues. As the Department's undisputed bid criteria did not evaluate the lowest pre-discount cost but rather incentivized bidders to offer the highest pre-discount price, the approach and criteria employed by the Department, from the start, were fatally flawed. The Department's error cannot be cured by subsequent post-bid award claims that both price and non-price factors were properly evaluated or that ISIS 2000's proposal was less than evaluated on the record.

Before non-cost factors may even be considered, Section 54.504 requires the objective consideration of pre-discount price so that if the local entity wants to pay a higher price for some non-cost reason, its decision will still be made in a fiscally responsible manner. Plainly, the Department's "creative" approach did just the reverse. Rather than provide the necessary incentive to obtain a cost-effective pre-discount price, it wrongly incentivized the highest pre-discount price obtainable.

Rather than confront these issues, the Fund Administrator's Decision on Issue #1 impermissibly deferred to "state and local competitive bid procurement review procedures and findings." This was error for two reasons.

First, Section 54.504 of the Commission's rules expressly predicates contract funding eligibility on compliance with FCC competitive bid requirements "in addition to" state and local competitive bid requirements. Accordingly, before a contract may be found to be eligible for funding, compliance with Section 54.504 competitive bid requirements must be determined by the Fund Administrator, wholly independent of the question of compliance with state and local requirements.

Second, by incorrectly characterizing the issue as limited only to whether the ENA bid constituted the most cost-effective bid, the Decision failed to deal with the more threshold issue of compliance with Section 54.504 competitive bid requirements. While Section 54.511 provides that the school or library may consider relevant factors other than the lowest pre-discount price in arriving at its determination of the most cost-effective bid, that ultimate evaluation is expressly predicated on the independent evaluation of cost factors (before the potentially offsetting non-cost factors are balanced) solely on the basis of overall pre-discount price. This, however, was not the approach followed by the Department. As its "creative" bid approach and criteria violated Section 54.504

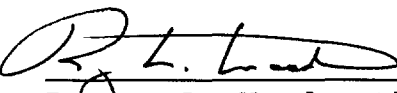
competitive bid requirements by expressly seeking the highest pre-discount price, there is no way that the resulting contract award to ENA could be found to be eligible for funding.


CONCLUSION

For these reasons, the Fund Administrator's decision on Issue #1 should be reversed and the ENA contract found ineligible for funding based on the clear and unequivocal violation of Section 54.504 competitive bid requirements.

Respectfully submitted,

WILKES, ARTIS, HEDRICK & LANE,
Chartered

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Ramsey L. Woodworth

By: 
Rudolph J. Geist

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Attorneys for Integrated
Systems and Internet
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March 29, 1999

ATTACHMENT A

Request for Proposals
Evaluation and Contract Award Provision

and

Proposal Score Summary Matrix

6 EVALUATION AND CONTRACT AWARD

6.1 Proposal Evaluation Categories and Weights

The categories that shall be considered in the evaluation of proposals are Qualifications, Experience, Technical Approach, and Cost. Each category shall be weighted as follows, and one hundred (100) points is the maximum total number of points which may be awarded to a proposal:

Maximum Points Awarded for Proposer Qualifications:	10
Maximum Points Awarded for Proposer Experience:	15
Maximum Points Awarded for Technical Approach:	45
Maximum Points Awarded for Cost Proposal:	30

6.2 Proposal Evaluation Process

6.2.1 The evaluation process is designed to award the procurement not necessarily to the Proposer of least cost, but rather to the Proposer with the best combination of attributes based upon the evaluation criteria.

6.2.2 The RFP Coordinator shall manage the proposal evaluation process and maintain proposal evaluation records. A Proposal Evaluation Team made up of three or more State employees shall be responsible for evaluating proposals.

6.2.3 All proposals shall be reviewed by the RFP Coordinator to determine compliance with mandatory proposal requirements as specified in this RFP. If the RFP Coordinator determines that a proposal may be missing one or more such requirements, the Proposal Evaluation Team shall review the proposal to determine if it meets minimal requirements for further evaluation; if the State shall request clarification(s) or correction(s); or, if the State shall determine the proposal non-responsive and reject it. (See Attachment 9.3, Proposal Requirements Checklist).

6.2.4 The Proposal Evaluation Team shall evaluate proposals determined to have met proposal requirements based upon the criteria set forth in this RFP. Each evaluator shall score each proposal. The evaluation scoring shall use the pre-established evaluation criteria and weights set out in this RFP. Each evaluator shall use only whole numbers for scoring proposals. (See Attachment 9.4, Technical Proposal Evaluation Format).

6.2.5 The State reserves the right, at its sole discretion, to request clarifications of proposals or to conduct discussions for the purpose of clarification with any or all Proposers. The purpose of any such discussions shall be to ensure full understanding of the proposal. Discussions shall be limited to specific sections of the proposal identified by the State and, if held, shall be after initial evaluation of Technical Proposals. If clarifications are made as a result of such discussion, the Proposer shall put such clarifications in writing. If clarifications are requested and written after the Proposal Evaluation Team has scored a subject Proposal, the evaluators may re-score the clarified Technical Proposals.

6.2.6 Upon completion of Technical Proposal scoring by the Proposal Evaluation Team, the RFP Coordinator shall calculate the average Technical Proposal score for each proposal.

6.2.7 After opening the Cost Proposals, the RFP Coordinator shall calculate scores for each Cost Proposal. (See Attachment 9.5, Cost Proposal Evaluation Format).

The Cost Evaluation scores shall be based on the amount indicated in the Cost Proposal for State and Local funds combined with FCC E-Rate funds paid to the proposer. State and Local funds may be augmented by Other Funding specified and offered by proposer and by any Savings generated from State and Local funds. These amounts shall be used in the following formula to determine the Cost Factor

toward calculating the points a Proposer shall receive for the Cost Proposal:

Total State & Local, Other Funds, Savings and FCC funds paid to proposer divided by Total State and Local Funds, excludes Savings, FCC, Other Funds equals the Cost Factor of Proposal Being Evaluated.

Proposal with the Highest Cost Factor is awarded 30 points for Cost Proposal.

This factor can be improved by *decreasing* "Total State and Local funds", or *increasing* "Total State, Local, Other Funding, Savings and associated FCC funds paid to proposer" or accomplishing both. Under no circumstance can the Total State and Local funds exceed amount specified in Cost Proposal Format. Under every circumstance the Proposer's total submitted costs to the FCC will be discounted 60%, which has been changed to 66% in the RFP 97-2 Amended as the state specified aggregate percentage.

Every other proposal is awarded points based on the following ratio: Factor of Proposal Being Evaluated divided by Highest Cost Factor. Then the ratio is multiplied by the Maximum Cost Points:

Cost Factor of Proposal Being Evaluated divided by Highest Cost Factor multiplied by Maximum Cost Points equals Points for Proposal Being Evaluated

Example:

Proposal # 1: Combined State, Local & FCC = \$12,500,000. State and Local total is \$5,000,000. Cost Factor = \$12,500,000 / \$5,000,000 = 2.5.

Proposal # 2: Combined State, Local, Other and Savings = \$13,125,000. State and Local is \$4,750,000. Cost Factor = \$13,125,000 / \$4,750,000 = 2.763. This is determined to be the Highest Cost Factor.

Highest Cost Factor of 2.763 for Proposal # 2 is awarded 30 points. Proposal # 1 is awarded points by the ratio of 2.5 / 2.763 = .905. This ratio multiplied by the Maximum Cost Points equals 27.14 Cost Points.

- 6.2.8 The RFP Coordinator shall combine the average Technical Evaluation scores with the Cost Evaluation scores for each Proposer. (See Attachment 9.6, Proposal Score Summary Matrix).
- 6.2.9 All proposal evaluation calculations shall result in numbers rounded to the nearest three decimal places (e.g., 9.999).

6.3 Contract Award

- 6.3.1 The RFP Coordinator shall forward results from the proposal evaluation process to the head of the procuring agency for a contract award decision. Contract award decisions shall be subject to the approval of appropriate State officials in accordance with applicable State laws and regulations.
- 6.3.2 The State reserves the right to make an award without further discussion of any proposal submitted. There shall be no best and final offer procedure. Therefore, each proposal should be initially submitted on the most favorable terms the vendor can offer.
- 6.3.3 After the evaluation of proposals and contract award decision, the head of the procuring agency shall issue a written *Notice of Intent to Award* to all evaluated Proposers. The notice shall identify the proposal selected for award. However, any *Notice of Intent to Award* shall not create rights or interests in any vendor.
- 6.3.4 Upon release of a written *Notice of Intent to Award* the RFP files shall be made available for public inspection.

- 6.3.5 The State reserves the right, at its sole discretion, to further clarify or negotiate with the best evaluated Proposer subsequent to *Notice of Intent to Award*.
- 6.3.6 The apparently successful Proposer shall be expected to enter into a contract with the State which shall be substantially the same as the *pro forma* contract included in Section Eight of this RFP. However, the State reserves the right to add terms and conditions, deemed to be in the best interest of the State, during contract negotiations. Any such terms and conditions shall be within the scope of the RFP and shall not affect the proposal evaluations.
- 6.3.7 If the selected Proposer fails to sign and return the contract drawn pursuant to this RFP within fourteen (14) days of its delivery to the Proposer, the State may determine, at its sole discretion, that the Proposer has failed to enter into a contract with the State in accordance with the terms of this RFP, and the State may open negotiations with the next best evaluated Proposer.



TENNESSEE DEPARTMENT OF EDUCATION

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Nashville, Tennessee 37243-0381
(615) 741-2731

Jane Walters, Ph.D.
Commissioner

March 20, 1998

To: Commissioner Walters

From: Jacqueline B. Shrager, RFP Coordinator

A handwritten signature in cursive script, appearing to read "J. B. Shrager".

Re: RFP 97-2

Attached is the Proposal Score Summary Matrix for the two proposal responses received.

ATTACHMENT 9.6

PROPOSAL SCORE SUMMARY MATRIX
RFS # 97-2

- JACQUELINE B. SIRAGO

3/19/98

RFP COORDINATOR
DATE

COMPILATION

PROPOSER QUALIFICATIONS	ENA (Maximum 10 Points)		ISIS2000 (Maximum 10 Points)		PROPOSER NAME (Maximum 10 Points)	
[Waldie	7		5			
[Shrago	10		10			
[Hoover	10		10			
[Kompere	9		9			
average:		9		8.5		
PROPOSER EXPERIENCE	(Maximum 15 Points)		(Maximum 15 Points)		(Maximum 15 Points)	
[Waldie	11		9			
[Shrago	14		13.5			
[Hoover	15		15			
[Kompere	12		11			
average:		13		12.125		
TECHNICAL APPROACH	(Maximum 45 Points)		(Maximum 45 Points)		(Maximum 45 Points)	
[Waldie	32		23			
[Shrago	38.5		21			
[Hoover	36		30			
[Kompere	35		30			
average:		35.375		26		
COST PROPOSAL	(Maximum 30 Points)		(Maximum 30 Points)		(Maximum 30 Points)	
score for cost:		30		20.837		
PROPOSAL SCORE	(Maximum 100 Points)		(Maximum 100 Points)		(Maximum 100 Points)	
total score:		87.375		67.462		

Note: Use as many sheets as necessary to summarize scores for all Proposers evaluated.

	Formulas	Example1 from RFP	Example2 from RFP	ENA	ISIS Backbone	ISIS Optional
Total State & local (d.i)		\$5,000,000	\$4,750,000	\$17,780,000	\$17,653,709	\$17,640,035
Other Funds (d.ii)		\$0	\$0	\$7,500,000	\$295,400	\$295,400
Savings (d.iii)		\$0	\$250,000	\$0	\$129,616	\$143,288
FCC funds pd. to proposer (d.iv)		\$7,500,000	\$8,125,000	\$49,072,941	\$33,196,659	\$32,460,810
Total Numerator (d.v)	\$0	\$12,500,000	\$13,125,000	\$74,352,941	\$51,275,384	\$50,539,533
Total State & Local, excludes savings, FCC, other (d.i)						
Total Denominator (d.i)	\$0	\$5,000,000	\$4,750,000	\$17,780,000	\$17,653,709	\$17,640,035
Cost Factor	B8/b12	2.500	2.763	4.182	2.905	2.865
Calculation of Highest Cost Fact		0.905	1.000	1.000	0.695	0.685
Calculation of Cost Points	30.000	27.143	30.000	30.000	20.837	20.554

ATTACHMENT 9.5
COST PROPOSAL EVALUATION FORMAT
RFS # 97-2

ENA

Proposer Name

Jacqueline B. Shrago
RFP Coordinator

3/19/98
Review Date

The RFP Coordinator shall use the following formula to calculate the Proposer's total proposed cost for State, Local funds, Other, Savings and FCC E-Rate funds for the service to be procured under the subject RFP during the total contract period.

[Attached spreadsheet(s), Attachment 9.2, to be completed and returned in Excel 95 format, version 5.0]

NOTE: If any hypothetical formula is to be used in calculating the total proposed cost given the proposed costs and a hypothetical utilization scenario, said hypothetical formula shall be referenced in the formula above, and the detailed hypothetical formula shall be filed with and approved by the Department of Finance and Administration Office of Contracts Administration prior to the date for opening proposals submitted under this RFP.

The RFP Coordinator shall use the following matrix to calculate the **SCORE** for the subject cost proposal (calculations shall result in numbers rounded to three decimal places):

1	Cost Factor for <u>this</u> proposal:	4.182
2	Highest Cost Factor from <u>all</u> proposals:	4.182
3	The amount calculated by dividing the factor in row one (1) by the factor in row two (2) above:	1.0
4	The maximum number of points that shall be awarded for the Cost Proposal category:	30
5	The product calculated by multiplying the amount in row three above times the number in row four above:	30
THE NUMBER IN ROW FIVE (5) IS THE COST PROPOSAL SCORE		30

ATTACHMENT 9.5
COST PROPOSAL EVALUATION FORMAT
RFS # 97-2

ISIS2000

Proposer Name

Jacqueline B. Shrager

3/19/1998

RFP Coordinator

Review Date

The RFP Coordinator shall use the following formula to calculate the Proposer's total proposed cost for State, Local funds, Other, Savings and FCC E-Rate funds for the service to be procured under the subject RFP during the total contract period.

[Attached spreadsheet(s), Attachment 9.2, to be completed and returned in Excel 95 format, version 5.0]

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The RFP Coordinator shall use the following matrix to calculate the **SCORE** for the subject cost proposal (calculations shall result in numbers rounded to three decimal places):

1	Cost Factor for <u>this</u> proposal:	2.905
2	Highest Cost Factor from <u>all</u> proposals:	4.182
3	The amount calculated by dividing the factor in row one (1) by the factor in row two (2) above:	.695
4	The maximum number of points that shall be awarded for the Cost Proposal category:	30
5	The product calculated by multiplying the amount in row three above times the number in row four above:	20.837
THE NUMBER IN ROW FIVE (5) IS THE COST PROPOSAL SCORE		20.837

ATTACHMENT 9.5
COST PROPOSAL EVALUATION FORMAT
RFS # 97-2

ISIS2000 (optional)

Proposer Name

Jacqueline B. Shrago

3/19/1998

RFP Coordinator

Review Date

The RFP Coordinator shall use the following formula to calculate the Proposer's total proposed cost for State, Local funds, Other, Savings and FCC E-Rate funds for the service to be procured under the subject RFP during the total contract period.

[Attached spreadsheet(s), Attachment 9.2, to be completed and returned in Excel 95 format, version 5.0]

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1	Cost Factor for <u>this</u> proposal:	2.865
2	Highest Cost Factor from <u>all</u> proposals:	4.182
3	The amount calculated by dividing the factor in row one (1) by the factor in row two (2) above:	.685
4	The maximum number of points that shall be awarded for the Cost Proposal category:	30
5	The product calculated by multiplying the amount in row three above times the number in row four above:	20.554
THE NUMBER IN ROW FIVE (5) IS THE COST PROPOSAL SCORE		20.554

CERTIFICATE OF SERVICE

I, Ramsey L. Woodworth, hereby certify that copies of the foregoing Request for Review in Part of Fund Administrator's Explanation of Funding Commitment Decision were served this 29th day of March, 1999, via first-class mail, postage prepaid, to the following individuals at the addresses listed below:

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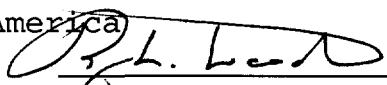
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